

Subject: People For Puget Sound Critical Habitat Comment Letter - Orcas

From: "Heather Trim" <htrim@pugetsound.org>

Date: Mon, 14 Aug 2006 14:55:32 -0700

To: <orcahabitat.nwr@noaa.gov>

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Dear Lynne and Donna,

Attached is our comment letter on the proposed Critical Habitat for the Southern Resident Orcas. A hard copy will follow by mail.

Thank you for all of your hard work on orca recovery.

Sincerely,

Heather Trim

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People For Puget Sound Orca Critical Habitat letter Aug 14 2006.doc

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August 14, 2006

Donna Darm
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VIA email: orcahabitat.nwr@noaa.gov

RE: Proposed Critical Habitat for Southern Resident Killer Whales

Dear Ms. Darm,

Thank you for the opportunity to comment on the *Proposed Critical Habitat for Southern Resident Killer Whales* dated June 15, 2006 (Federal Register Vol. 71, No. 115, page 34571-34588). We appreciate the hard work of the National Marine Fisheries Service staff to develop this plan as well as the Recovery Plan. We applaud NMFS for recognizing that all of Puget Sound is critical habitat for the Southern Residents.

People For Puget Sound is a nonprofit citizens' organization whose mission is to protect and restore the health of Puget Sound and the Northwest Straits, through involvement and action.

The main threats to killer whales in Puget Sound are low prey (salmon) abundance, environmental contaminants, vessel effects and sound, and oil spills. A complete Critical Habitat area is needed to address *all* of these threats if we are to recover the southern residents to health.

Our specific concerns with the proposal are the military, nearshore, Hood Canal and offshore Pacific Coast exclusions, as well as the elimination of sound as an "Essential Feature."

1. Military Area Exclusions

Under the Endangered Species Act, the Secretary of Commerce may exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless excluding the area will result in the extinction of the species concerned. In this plan, the agency proposes to exclude from the designation 18 sites for military reasons, covering nearly 112 square miles of habitat.

The Service proposes to exclude these areas because of the high priority on national security, the potential for Critical Habitat designation to have some impact on military readiness, and the fact that collectively, the proposed exclusions represent only a small percentage of the total habitat. People For Puget Sound recognizes the need for safeguarding our national security, but we believe these exclusions will adversely affect

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orca recovery, largely because they are blanket exclusions for non-military actions as well.

We propose that instead of excluding large areas of orca habitat—exclusions that would apply to all, not just the military actions—that NOAA develop a specific agreement with the military that would address both military readiness concerns and the ways in which the military could avoid orca impacts and even aid orca conservation and recovery. If, however, you do choose to establish exclusions on the basis of military necessity, we feel that the exclusions 1) should be much smaller, 2) should specifically address military impacts on orcas, and 3) should not exclude non-military actions.

The most troubling of the proposed military exclusions is a huge area that reaches all the way across the entrance to central Puget Sound—between Whidbey Island and Port Townsend, extending far out into the Strait of Juan de Fuca. Orcas will have no way to get in and out of the central Sound without crossing a huge unprotected stretch. The description of the reason for restriction of Admiralty Inlet is “open water marine area for support of operations at Naval Air Station Whidbey Island.” This is not a strong justification for such a huge area, especially given that we anticipate that both military and non-military shipping and boating will continue in the area, whether or not it is excluded from Critical Habitat. The Carr Inlet exclusion is also quite large, and also in an area where non-military activities may pose increasing concerns for orca survival.

Instead of large exclusions, we propose that a Memorandum of Understanding (MOU) be developed in parallel with the Critical Habitat plan, in which NOAA agrees to avoid hindrances to military readiness, and the military agrees to modify their activities, where feasible and without compromising national security, in order to protect orcas and assist orca recovery both within and outside any excluded areas.

The Navy has been a good partner in many aspects of orca protection, and we can envision a partnership in which the Navy more proactively works to protect and restore orcas. For example, as suggested by others as well, Navy submarines could be used to identify Puget Sound's orcas when they travel into the ocean. Navy ships could serve as research platforms to observe bird and fish movements. And shore-based military facilities could identify and track orcas when they are nearby. A comprehensive network of hydrophones in Puget Sound/Strait of Juan de Fuca would be helpful for tracking orcas and perhaps could be of use to the Navy as well.

The main purpose of an MOU would be to address the military's needs for readiness, without making a wholesale exclusion for all agencies. At the same time, it would be an effective vehicle to address impacts that military activities may have on orcas, both inside and outside any excluded areas:

A. Mid and low frequency sonar. The Navy during training and testing activities should stay away from active orca areas.

B. Vessel movement. Vessel interactions should be minimized.

C. Noise. Noise from explosions, construction and other activities should take orca presence into consideration.

D. Toxic contaminants. In both contaminated sediment areas and in discharges from onshore and off shore operations, the military should eliminate toxic contaminants that are biomagnified in the food web, such as PCBs, PBDEs, and others. The balance of risks/benefits of the exclusion should consider the many military activities that are not related to actual readiness, such as stormwater runoff.

Actions in which the Navy is already a pro-active partner in recovery of orcas (from the Conservation Plan):

- A. “Any ship, submarine or unit wanting to use active mid-frequency sonar in Puget Sound, including the Strait of Juan de Fuca, is required to obtain prior permission from Commander, U.S. Pacific Fleet.
- B. The Navy avoids training in major marine mammal concentration areas when possible, listens for vocalizing animals with passive sonar before commencing exercises, and suspends or ceases sonar operations when marine mammals are detected. Reports of marine mammal activity are passed on to command personnel to ensure Navy vessels avoid marine mammals.
- C. The Navy coordinates with NMFS on necessary authorizations under the MMPA and ESA on many activities where impacts on protected resources may occur as contemplated by the legislation.”

If, in addition to an MOU, it is still necessary to exclude any areas, the exclusions justified by military necessity should not apply to non-military entities or activities. **It is crucial that any areas excluded for military purposes not be excluded for other types of actions.** Examples of nonmilitary issues that are of concern include nonmilitary storm drains, wastewater outfalls and fuel transfers. In the future, tidal energy projects, seismic exploration and other issues may arise as well.

Oil spills are of particular concern. A catastrophic oil spill is considered the biggest threat to orca recovery and survival. We are concerned that excluded areas might imply less sensitivity to oil spills, which could affect both prevention and response policies, procedures and priorities.

We recognize that NOAA believes that an area is either designated critical habitat or not. This is one of the reasons that we urge you to explore how an MOU with the military could address their concerns, yet not exclude these areas from critical habitat.

2. Nearshore Exclusion

Most of Puget Sound’s problems originate from pollution and habitat destruction on the shore. Many actions in which federal funding, permits, or projects are involved occur in the nearshore. **People For Puget Sound believes that the Service should not include a nearshore exclusion in the final regulation, because of the physical, biological and chemical continuum of the Sound’s water and sediment to the edge of the shoreline.**

Our specific comments are:

- A. **Occupied area.** We feel that the 20-foot water depth designation is not scientifically justified. Ralph Munro has stated that his family has seen Southern Resident orcas using shallows for rubbing and for protection of calves. Researcher David Bain is submitting comments separately that documents his observations of orca use of shallower water as well. Also compelling is that fact that the **water** is really the Critical Habitat. To draw a line in the water at the 20-foot mark is creating a fiction—the water that laps the shore and the water in the shallow areas are one and the same with the adjacent deeper water. Making this artificial distinction will encourage proponents of damaging activities to think that as long as they are above the 20-foot mark, they will not be affecting orcas. We realize that legally, damaging activities in the nearshore could still be limited because of impacts on orcas, but the lack of practicality of dealing with this

distinction is overwhelming, and the message to other agencies and to the public is counter-productive.

- B. **Contaminated Sediment.** According to research results cited in the Recovery Plan, Southern Residents carry as high a load of PCBs as transient populations, levels likely to “exceed the toxicity levels believed to cause health problems in other marine mammals.” There are two pathways for contamination to enter the food web – direct and indirect. The direct pathway relates to consumption from the bottom up within the food chain, and the indirect pathway relates to consumption of larvae and plankton by larger species. In both cases, it is vitally important that contaminated sediment sites in Puget Sound be cleaned up in order to protect orcas. Many of the contaminated sites in Puget Sound include areas that are in water less than 20 feet deep and it is highly impractical to draw a line down the middle of these sites. Further, toxic contaminants move back and forth, sometimes as frequently as a tidal cycle.
- C. **Toxic discharges.** Toxic contaminants in orcas also come from ongoing discharges of wastewater, urban runoff and groundwater inflows. Whether the discharge point is above or below the 20-foot mark is irrelevant to the importance of the issue. NOAA should not want to imply that discharges in shallow water are somehow outside the orcas’ Critical Habitat.
- D. **Noise.** Noise is a significant factor for orcas and major steps need to be taken to address this issue in the nearshore, as well as in deeper water. Orca whales calve and feed in Puget Sound waters; their fishing, calf-rearing and travels are likely disrupted by noise from marine traffic, loading, and barging operations. For example, whale researcher David Bain has estimated that noise from operations associated with one specific project – a proposed gravel mine dock on Maury Island - could remove a huge portion of the whales’ winter use area. Currently, orcas strongly favor the Maury Island shore when they are using this portion of the Sound. Newborn calves have been observed near the project area. A recent article (Times Colonist, May 22, 2005, “Luna trapped by wave of noise”) details potential impacts to one orca from noise.
- E. **Major Project Review.** The Critical Habitat map should include the nearshore because major projects located in shallow water areas can have a significant negative impact on orcas. If such projects are proposed within the Critical Habitat (i.e., one that extends to the water’s edge) then appropriate federal review will be triggered to protect orcas. If shallow water areas are excluded, it will be far less routine to analyze and avoid impacts on orcas, even though the expected impacts could be as great or greater than projects that occur or extend into deeper water.
- F. **Climate Change.** Given predictions of sea level change, the excluded area, as defined by water depth greater than 20 feet will shift over the next decades. This will create much greater confusion and implementation headaches than a Critical Habitat designation that simply included the water all the way to the shore.

3. Hood Canal Exclusion.

Hood Canal should be included in the Critical Habitat designation. Citizens who live near Hood Canal as well as researchers have provided photographic and acoustic evidence that Southern Resident orcas have occupied Hood Canal on a regular basis for many years. The most recent sightings documented thus far are in the 1990s, which is very recent, especially in view of orca lifetimes. Given that orcas are long-lived animals, NMFS should use a window of at least 30 years to define “occupied at the time of listing.” If the bull trout window was 20 years, then the orca window should be longer. Southern Residents seem to use Hood Canal when there are

salmon to eat, and salmon restoration efforts are well underway in Hood Canal. It would be short-sighted and unjustified to exclude this area from Critical Habitat, when it is so essential for their recovery for them to make use of available prey species as they recover. Many Southern Residents that are still alive used Hood Canal, so there is an additional reason to think that their memory of the area will take them back there when salmon populations warrant.

We suggest that Hood Canal be added to the Critical Habitat through an amendment process so that any needed public review can occur later in the fall – so as to *not* slow down the finalization of the proposed Critical Habitat plan.

4. Offshore Pacific Coast Exclusion

People For Puget Sound supports extending the proposed designation to include waters beyond the mouth of the Strait of Juan de Fuca in order to encompass at least the Olympic Coast National Marine Sanctuary. The current proposal excludes 50 % of truly critical habitat that the K and L pods use during the winter --the outer coast of Washington, Oregon, and California (as well as the outer coast of Vancouver Island and the Queen Charlottes). Additionally, we encourage NMFS to coordinate with your Canadian counterpart, Fisheries and Oceans Canada, to develop a bi-lateral recovery strategy for Southern Resident Orca Whales in our shared waters.

5. Sound should be an “Essential Feature”

We disagree with NMFS’s decision to remove Sound as an Essential Feature for orcas. According to the Federal Registrar Notice:

Joint NMFS–U.S. Fish and Wildlife Service regulations for listing endangered and threatened species and designating critical habitat at 50 CFR 424.12(b) state that the agencies “shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection (hereafter also referred to as ‘Essential Features’ or ‘Primary Constituent Elements’/ ‘PCEs’).” Pursuant to the regulations, such requirements include, but are not limited to, the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations state that we shall focus on essential features within the specific areas considered for designation. These features “may include, but are not limited to, the following: spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types.”....Based on this natural history of the Southern Resident killer whales and their habitat needs, the physical or biological features of Southern Resident killer whale habitat identified in the proposal to list the species (69 FR 76673; December 22, 2004) were: (1) Water quality to support growth and development; (2) Prey species of sufficient quantity, quality and availability to support growth and development; (3) Sound levels that do not exceed thresholds that inhibit communication or foraging activities or result in temporary or permanent hearing loss; and (4) Safe passage conditions to support migration and foraging.

As part of the proposal to designate critical habitat NMFS has removed the 3rd feature – sound levels – without explanation. We feel that keeping sound to acceptable levels is essential for the physiological environment for orcas so that they can successfully mate, feed, rest, travel, and protect their young. If orcas avoid certain areas because of noise, their habitat is reduced. Worse, if their habitat is contaminated by certain intensities of sound, similar in concept to toxic contamination, then they could be physically hurt. Noise is considered a pollutant in other contexts that are well-developed in regulation and law. **We fail to see a legal, conceptual or practical barrier to considering an acceptable level of sound as an essential feature of Critical Habitat.** NOAA itself has been highly aware of noise pollution in its efforts to protect whales and other marine mammals—for example, the strong emphasis on controlling whale watching from boats.

In conclusion, we look forward to working with you to restore our precious orca population. We urge you to adopt the changes that we have included in this letter. If you have any questions, please feel free to call me at (206) 382-7007, Naki Stevens at (360) 754-9177 or Heather Trim at (206) 382-7007 X215.

Sincerely,

Kathy Fletcher
Executive Director